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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1348~~ 123

EMMA D. LYNN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Petitioner, Emma D. Lynn, prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey, entered in this case on March 14, 1967.

Opinion Below

There is no written opinion by the Supreme Court of New Jersey. There was, however, a *per curiam* opinion by the Appellate Division of the Superior Court of New Jersey. The latter opinion is printed in Appendix A hereto. The order of affirmance of the Supreme Court of New Jersey without opinion is appended hereto as Appendix B.

Jurisdiction

The order of the Supreme Court of New Jersey here sought to be reviewed was dated March 14, 1967 (Appendix B hereto, *infra*). That order affirmed without opinion the judgment of the Appellate Division of the Superior Court of New Jersey entered December 30, 1966, which had affirmed a judgment of the Essex County Court, Criminal Division, upon a verdict convicting the within petitioner, Emma D. Lynn, on one count of possession of narcotic drug.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States more particularly the 4th Amendment (search and seizure), Fifth Amendment (self incrimination), Sixth Amendment (right to counsel) and Fourteenth Amendment (due process).

Questions Presented

1. Is there not a violation of the Fourteenth Amendment of the Constitution of the United States where the affidavit in support of a search warrant sets forth the mere conclusions, suspicions, or beliefs of a reliable informant rather than underlying facts and circumstances, and the evidence seized as a result thereof is admitted in evidence against the defendant?

2. Is there not a violation of the Fourteenth Amendment of the Constitution of the United States where the trial court did not conduct a *voir dire* as to the voluntariness of an oral statement of the defendant even though no objection was interposed by counsel?

3. Is there not a violation of the defendant's rights under the Fourteenth Amendment of the Constitution of the

United States where the trial court permitted, over objection of the defendant, comments by the prosecutor with reference to the silence of the defendant, particularly where the court subsequently charged the jury in a manner which directed attention to the defendant's failure to take the stand?

Constitutional Provisions and Statute Involved

The case involves the Fourth Amendment (search and seizure), the Fifth Amendment (self incrimination), the Sixth Amendment (right to counsel), and the Fourteenth Amendment (due process) of the United States Constitution. The State statute whose violation is charged in the indictment, N.J.S.A. 24:18-4 (possession of narcotics) is not printed herein because no issue relating thereto is involved in this petition for *certiorari*.

Statement of the Case and How the Federal Questions Are Presented

On October 1, 1964, the defendant, Emma Lynn, was indicted by the Essex County Grand Jury in Indictment No. 150-64, (Appendix C) for the crime of possession of a narcotic drug, to wit, heroin. On September 10, 1964, the defendant moved to suppress the evidence on the ground that the narcotics seized in a raid by the Essex County Sheriff's detectives was procured as a result of an unlawful search and seizure in violation of the Fourth Amendment of the Constitution of the United States. The said motion was denied. On March 17 and 18, 1966, the defendant was tried before the Essex County Court and a jury upon the said indictment and was convicted of the crime of possession of a narcotic drug. On May 11, 1966, the defendant was sentenced by the Essex County Court to a term of not less than eight nor more than ten years in

the New Jersey State Prison, the custodial portion of her sentence to be served at Clinton Reformatory for Women and the defendant was further fined $1,000.00.

On May 11, 1966, the defendant filed a notice of appeal to the Appellate Division of the Superior Court of New Jersey from the final judgment of the Essex County Court entered on March 18, 1966. On December 30, 1966, in a *per curiam* opinion, (Appendix A) the Superior Court of New Jersey, Appellate Division affirmed the conviction of the defendant.

On January 23, 1967, in accordance with the Rules of Practice of State of New Jersey, the defendant filed a notice of appeal and a notice of petition for certification to the Supreme Court of New Jersey from the judgment of the Superior Court of New Jersey, Appellate Division. On March 14, 1967, the said petition for certification was denied and simultaneously therewith the appeal was dismissed by the Supreme Court of New Jersey (Appendix B).

The Search

On or about May 20, 1964, representatives of the Essex County, New Jersey, Sheriff's Office applied before the Essex County Court for a search warrant ordering the search of the person of Emma D. Lynn, the defendant, and the premises at 86 West Kinney Street, Newark, New Jersey. The affidavit of Lieutenant Thomas Mueller of the Sheriff's Narcotics Squad was submitted (Appendix D). At the time of that application, the court saw the necessity of taking additional testimony from Lieutenant Mueller which was stenographically transcribed (Appendix E). Thereafter, the court issued a search warrant for the search of the defendant and the above described premises (Appendix F).

Armed with this warrant, the officers entered the premises at 86 West Kinney Street, Newark, New Jersey, and searched the defendant and the premises and seized from the said premises a quantity of narcotic drugs. The defendant, Emma D. Lynn, was thereafter arrested and charged with possession of a narcotic drug. In his affidavit, Lieutenant Mueller states that he received information from a reliable informant that Emma D. Lynn is involved in narcotics sales; that he made an investigation on May 5th that revealed that Emma D. Lynn was living at 86 West Kinney Street, Newark, New Jersey; that she had a previous criminal record; and that on May 5th, 6th, 7th, 8th, 12th, 13th, 15th and 16th, he was in the neighborhood and saw known addicts enter and leave the house of Emma D. Lynn. In the supplemental testimony taken by the issuing court, the judge asked Lieutenant Mueller what the information was that was given to him by the informant and his answer was "That she was selling narcotics" (Appendix E, 8a). The court further asked Lieutenant Mueller what his investigation disclosed and he replied, "Disclosed that she is living at 86 West Kinney Street, in Newark" (Appendix E, 9a).

The court then asked whether she (the defendant) was the sole occupant of the house and the officer replied, "There are several people in this; she has a daughter living there right now, and there is another man" (Appendix E, 9a). In response to another question by the court on what the investigation showed as to her being in charge or owning the house, the officer answered, "Well, that the house was . . . she receives mail there; that the house is in her name, and has lived there for many years prior to this date" (Appendix E, 9a). Lieutenant Mueller then stated that on several days he had seen persons he knew to have been convicted of the use of narcotics, some of whom he

knew by name, enter and leave the premises (Appendix E, 9a, 10a).

The Trial

The first witness produced by the prosecution was Lieutenant Thomas Mueller, who testified that he, in the company of Detectives Suckey, Scott, Hertig, and Fennessey, of the Essex County Sheriff's Office, executed the search warrant at the premises of 86 West Kinney Street, Newark, New Jersey. He testified that the search revealed, *inter alia,* a quantity of suspected heroin, found in a pocketbook in one of the bedrooms. He further testified that he witnessed a conversation between the defendant and Detective Suckey at the time of the search, which was the following:

> "Q. What, if anything, was said to Mrs. Lynn regarding these three pocketbooks? A. Suckey says, 'Are these yours?' She held all three of them up. I'm watching, and she says, 'Yes, they're mine.'" (Appendix G, 14a, 15a)

No objection was interposed by counsel for the defendant, but the State failed to prove nor offered to prove the voluntariness of the above statement of the defendant. Furthermore, the court required no *voir dire* on the question of voluntariness.

Detective Suckey of the Essex County Sheriff's Office then testified to the same crucial conversation. Detective Suckey further testified, under examination by the prosecutor, that the defendant admitted ownership of the pocketbooks, one of which contained the heroin (Appendix G, 15a). Again, no *voir dire* as to voluntariness of this statement.

Thereafter, one Mrs. Black, an occupant of the room where the narcotics were found, testified that she and her

deceased paramour occupied the room in question. The prosecutor, on cross-examination, asked her, "Did Mrs. Lynn (the defendant) tell the police that you and Pete had lived in that front bedroom for the past year?" Mrs. Black responded that she did not hear the defendant say that to the police (Appendix G, 16a). In his summation, the prosecutor stated the following (Appendix G, 17a):

> "Mrs. Lynn didn't tell the detectives that she hadn't been living in that front bedroom since she left for Kentucky. I heard no such testimony from the detectives. I heard no such testimony from the detectives or even from the defense witnesses, and I asked Mrs. Black:
>
> 'Did you hear Mrs. Lynn in the kitchen talk or tell the police that she did not live in the bedroom?'
>
> and she said,
>
> 'No, I didn't hear her tell that to the police and I didn't hear the police ask her either,'
>
> she said."

The foregoing was properly objected to by counsel for the defendant on constitutional grounds, and the court permitted the comment, all in the presence of the jury. In meeting the objection, the prosecutor further commented (Appendix G, 18a).

> "Your Honor, this is a comment. She is in the room talking. I am asking the jury if it is significant when the police asked of her 'Who lives here?' she did *not* say 'Not me; somebody else.'" (Emphasis added.)

The Charge

During the charge to the jury, the court stated the following (Appendix G, 19a):

"Now, this isn't a difficult case to decide, members of the jury. Stripped of all its verbiage, stripped of all its trappings, what do we have? The State of New Jersey contends and has attempted to prove that this particular defendant on the day named in the indictment was in unlawful possession of this heroin. The defendant says: 'Oh, no. I wasn't in possession of it. I couldn't have been in possession of it because I didn't know it was in the bag.' And the defendant says further and produces evidence that this heroin was placed in this bag by Pete, and, therefore, she had no intention to possess, to control, to exercise any dominion over it.

"Now, if you believe that story, you should acquit this defendant because she did not have possession of this heroin. But do you believe her? Do you believe her story? This case resolves itself into a question of fact and it seems to me, if you believe the state's story, you ought to convict this woman.

"Now, which is the more believable, the story more consonant with the truth, the story more consonant with the fact? Is it to be found in the State's exposition, or is it to be found in the defendant's contentions?"

The above charge was objected to at side bar by counsel for the defendant on the ground that it required the jury to believe the defendant (who did not take the stand in this case), in order to acquit (Appendix G, 20a, 21a).

Reasons for Granting the Writ

I

The affidavit and supporting testimony (Appendix D and E, 6a-11a), in support of the search warrant in the case at bar sets forth that Lieutenant Mueller, the affiant, was told by a reliable informant that Emma D. Lynn, the defendant, *was selling narcotics.* (Emphasis added.) The informant did not disclose to Lieutenant Mueller when the defendant was selling narcotics, nor did the informant disclose to Lieutenant Mueller any of the underlying facts and circumstances which would support such a conclusion. The informant did not even tell Lieutenant Mueller where the defendant was selling narcotics nor to whom.

The Fourth Amendment to the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unresonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

All evidence obtained by searches and seizures in violation of the Constitution of the United States is by that same authority inadmissible in a State court, whether or not such evidence was seized by Federal or State officers. *Mapp* v. *Ohio,* 367 U. S. 643 (1961). This rule has, of course, been adopted by the highest court of New Jersey. *State* v. *Macri,* 39 N. J. 250; 188 A. 2d 339 (1963).

A State court, in determining "reasonableness of a search or seizure" is obliged to apply the Federal stand-

ards and none other. *Kerr* v. *California,* 374 U. S. 23 (1963).

An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried actions of officers who may happen to make arrests. *U. S.* v. *Lefkowitz,* 285 U. S. 452 (1932). In determining the reasonableness of a search or seizure, the issuing magistrate should decide the question in areas of doubt in favor of the defendant. *Sgro* v. *United States,* 287 U. S. 206 (1932).

Before the judge is in a position to make a determination on the issuance of a search warrant, he must properly be made aware of the underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated. *Dumbra* v. *United States,* 268 U. S. 435 (1925). Legal proof, sufficient to establish guilt, is not required but *suspicion* and good faith on the officer's part, without more, will not suffice. (Emphasis added). See *Henry* v. *United States,* 361 U. S. 98 (1959). See also *Veeder* v. *United States,* 252 F. 414 (7th Cir. 1918), cert. denied 246 U. S. 675 (1918).

Whether a showing of probable cause has been made will, in each case, rest on its own particular footing. The determination will aim at faithfully vindicating the constitutional requirement without, however, placing any needless obstacles to law enforcement. In the instant case, it would have been a simple matter and no burden to enforcement of the law for Lieutenant Mueller to have asked the informant how he knew that narcotics were being sold, or any facts or underlying circumstances which might give rise to a reasonable conclusion that the defendant was in fact selling narcotics.

Although the reviewing court should pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for the police. *Aguilar* v. *Texas*, 378 U. S. 108 (1964).

In *Jones* v. *United States*, 362 U. S. 257 (1960), a detective's affidavit set forth that he had received information from an informant who stated that Jones and Richardson were involved in elicit narcotic traffic and kept a supply of heroin in their apartment. The informant further stated that he had gone to their apartment and had purchased narcotic drugs from them and that the narcotics were secreted in described places in the apartment. The affidavit also stated that Jones and Richardson were familiar to members of the narcotic squad, and had admitted the use of narcotics and had displayed needle marks as evidence of their use. The affidavit further included a statement that the informant had given previous information which was correct. In sustaining the issuance of a search warrant on the basis of the affidavit, this Court held that the facts set forth need not be first-hand, but may be based upon information from a reliable informant.

In the case at bar, the mere statement by a reliable informant that Emma D. Lynn was selling narcotics falls far short of *Jones* v. *United States*, *supra*, since that bare allegation would have been insufficient even it was made by the affiant. An affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search without stating facts upon which that belief is based. *Nathanson* v. *United States*, 290 U. S. 41 (1933).

The *Jones* case, *supra*, had the following ingredients which are not present in the case *sub judice*: (1) the informant stated to the authorities that the defendants had a supply

of heroin in their apartment; (2) the informant stated that he had actually gone to their apartment and that he, himself, purchased narcotics drugs from them. (3) The informant described to the authorities the particular places in which the narcotics were secreted in defendants' apartment. (4) The affidavit of the officer set forth that the defendants were familiar to members of the Narcotic Squad and had actually admitted the use of narcotic drug and had displayed needle marks of their use. It should be pointed out that there is nothing in the affidavit at bar to indicate that the defendant, Emma D. Lynn, had ever had anything to do with narcotic traffic, since the criminal record set forth in the affidavit here does not refer to narcotic drugs. The detailed factual information, both from the informant and the officers' actual observation in the *Jones, supra,* lead to the unalterable conclusion that probable cause existed for the search of the premises.

In *Aguilar* v. *Texas, supra,* this Court held that affidavits in support of search warrant must contain some of the facts and underlying circumstances, not mere conclusions, suspicions or beliefs of the attesting officer *or his informer* (Emphasis added) in order that the magistrate may perform his neutral function of independently drawing the inference of probable cause. This principle was applied in the case of *Biondo* v. *United States,* 348 F. 2d 272 (8th Cir. 1965), when the court listed the touchstones of *Aguilar.* It is clear the authorities cannot rely on information from a reliable informant where it does not appear that the informant had personal knowledge or had within his possession sufficient facts to justify his beliefs. To approve an affidavit containing information from a reliable informant such as the affidavit in *Aguilar, supra,* or the affidavit in the case at bar, would be opening the door to an intolerable evil and easy circumvention of the rule announced in

Nathanson v. *United States, supra; Giordenello* v. *United States,* 357 U. S. 480 (1958). The evil would be that a police officer, who arrived merely at a "suspicion", "belief" or "mere conclusion" that narcotics were in someone's possession, could not obtain a warrant, but he could then convey this conclusion to another police officer, who could then secure the warrant by swearing that he had received reliable information from a credible person that the narcotics were in someone's possession. Hence, the affidavit in the case at bar may be seeking to accomplish by indirection what the authorities could not constitutionaly do directly. *Aguilar* v. *Texas, supra,* further states:

> "The vice in the present affidavit is at least as great in *Nathanson* and *Giordenello.* Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself. It was that of an unidentified informant. The affidavit here not only contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in the petitioner's possession. The magistrate here certainly could not judge for himself the persuasiveness of the facts relied on to show probable cause. He necessarily accepted without question the informant's suspicion, belief or mere conclusion."

Hearsay information need not reflect the direct personal observations of the affiant, *Jones* v. *United States, supra.* The magistrate indeed must be informed of the underlying circumstances from which the informant concluded that the

narcotics were where he claimed they were and the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, had reason to believe that narcotics were being sold by Emma D. Lynn. While it might be argued by the State that in *Aguilar* the affidavit contained only information from a reliable informant with no supporting surveillance whatsoever and that the case at bar has supporting surveillance, there is, therefore, a distinction; that argument is without merit, since that very same argument was propounded by Mr. Justice Clark, in his dissent in *Riggan* v. *Virginia,* 384 U. S. 152 (1966). The majority, in *Riggan,* granted a Writ of certiorari and reversed, citing *Aguilar* v. *Texas, supra.* The above referred to dissenting opinion stated the following:

> "I don't see how this case can be controlled by *Aguilar* v. *Texas,* (citing). There the affidavit was based purely on hearsay. It was found inadequate under the rule applied in *Giordenello* v. *United States,* (citing where a majority of the court found that the complaint does not indicate any sources for complainant's belief and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. The affidavit here not only alleged '*personal observation*', but recited that the affiant had information from other reliable sources who were subsequently identified as police officers and private informants. I, therefore, dissent."

It is interesting to note that even in the *Riggan* affidavit, the information from the reliable informant identified the specific premises where the alleged illegal activity was taking place, a fact which is not present in the affidavit and supporting testimony in the instant matter.

Present in the affidavit in the instant case is the very evil which the Supreme Court of the United States sought to dispel in *Aguilar* v. *Texas, supra.* We do not know that Lieutenant Mueller did not receive his information from a reliable informant, who was a police officer and who saw nothing more than what Lieutenant Mueller, himself, saw, and knew nothing more than what Lieutenant Mueller, himself, knew.

> "If the officer himself saw the narcotics at a certain address, then he must so affirm, that is, 'because I saw the narcotic' or 'Sam Jones sold me some narcotics while I was there.' *If he relies upon an informant* (emphasis added), he must list the incidents which the informant states gives rise to reasonable grounds. A 'bare request' will not be enough, and this mistake, even where probable cause is obvious, may lose the case."

Nedrud, *Arrest, Search and Seizure,* National District Attorney's Association (1965) at p. 55.

The evil described in *Aguilar, supra,* could have been dispelled in the instant case during the testimony supplemental to the affidavit (Appendix E). However, in response to a query by the court as to what the information of the informant was, the officer added nothing except to reiterate the informant's conclusion. It is, therefore, even more reasonable to believe in the instant case, than in *Aguilar, supra,* that the officers were trying to accomplish by "hearsay evidence" that which they could not do by "direct evidence."

It is, therefore, respectfully urged that the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution have been violated herein.

II

Detective Suckey and Lieutenant Mueller testified that the defendant at the time of the search was asked who owned the pocketbooks, which subsequently were found to contain heroin. The defendant's response was testified to be that they were hers (Appendix G, 14a, 15a). The somewhat tenuous distinction for constitutional purposes between an admission and confession has been completely eliminated by the Supreme Court of New Jersey in *State* v. *Brown*, 46 N. J. 96, 215 A. 2d 9, 13 (1965). That view has been borne out by the principle enunciated in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). While the decision in *Miranda* post-dated the trial of this case, it is urged that the same rule always applied even prior to *Miranda*. In the *Miranda* case, *supra*. The Court stated the following:

> "The prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

There is, therefore, no question that the same rule must be applied to "admission" as to "confession."

In *Henry* v. *Mississippi*, 379 U. S. 443 (1965) this Court dealt with the problem of whether a constitutional right could be waived by failure to object. In *Henry* it was held that unless such waiver was in some fashion participated in by the defendant or the failure to object had some bearing as a trial tactic, mere failure to object could not constitute a waiver. There is no question that the requirement of the State to prove the voluntariness of a statement is of constitutional dimensions, *Jackson* v. *Denno*,

378 U. S. 368 (1964). While *Henry* v. *Mississippi* addressed itself to an issue arising under the Fourth Amendment, the same rule should apply to questions arising under the Fifth Amendment.

It is submitted that the State prior to introducing evidence of any statement by a defendant, notwithstanding the lack of any objection, prove at least in a preliminary fashion, the voluntariness of the same. The proper procedure was discussed in the Nedrud, *Confessions and Interrogation,* National District Attorneys Association (1965) at p. 65, where it was stated:

> "However in both the search and seizure area as well as in confessions *Henry* v. *Mississippi, supra,* may well be the case to watch as precedent thereon grows. The issue was whether a State procedural rule of objection was bypassed because of some trial tactic merely through negligence or incompetency or otherwise. The Court expressed a rather complicated rule that might be required. In substance it provided that the defendant must participate in the decision to waive an objection unless such waiver by the attorney had some bearing as a trial tactic. This could create a difficult situation for the Prosecuting Attorney to rectify: if the defense counsel does not object and the Prosecuting Attorney wants to be sure there is no error, he must call it to the attention of the Court; then the Court must call it to the attention of the defendant who in the final analysis must decide whether he wishes to enter the objection or waive the same.
>
> "The foregoing may seem somewhat preposterous. But it is presented to caution Prosecuting Attorneys, for this case must be read more thoroughly than

most Prosecuting Attorneys might realize. The defense counsel need not worry about this point; in fact, it is of benefit to his client as he will have an opportunity to raise an error in the trial his own refusal or failure to consult with his client before bypassing an objection."

The foregoing procedure does not seem a serious burden to the prosecution, especially as in the instant case where a crucial part of the State's case was the defendant's alleged admission of ownership of the pocketbook. Without such an admission in evidence, the jury might have inferred that any one of the number of people present in the house at the time of the raid was in possession of the narcotic drug. It is, therefore, essential that the trial court or the prosecution take it upon themselves to establish a proper foundation prior to any statement of a defendant being considered by a jury.

Had this case been tried subsequent to the decision of *Miranda* v. *Arizona, supra,* there would have been little question but that this statement would be inadmissible at a trial, even without inquiring into the question of whether any threats, promises or inducements were made to the defendant by the police or further inquiring into the atmosphere that prevailed at the time the statement was made, since it appears clear from the record that no warnings were given to the defendant and there is little question that the scope of the inquiry was critically focused upon the defendant. Nowhere in the record is there any proof of a qualifying nature which would lay the foundation for the proper admissibility of the statement in the instant case. It is respectfully urged that the failure of the defenant to object to the admission of a statement or confession does not constitute a waiver. This rule has been

adopted by the highest Court of the State of Rhode Island in *State* v. *Mendes*, 210 A. 2d 50 (1965). In *Mendes* the State contended that there was a valid waiver by the defendant of his constitutional rights by virtue of the fact that the defense counsel expressly stated that he had no objection to the admission of the statement. The Supreme Court of Rhode Island held that absent defendant's participation in his counsel's decision not to object to the admission of the incriminating statement, defendant's constitutional right to a voluntariness hearing could not be waived. In the case at bar, there was not even acquiescence to the admission by counsel as there was in *Mendes, supra.*

It is apparent that the highest Court of Rhode Island and the highest Court of New Jersey are applying two different rules concerning the necessity for a *voir dire* as to voluntariness where there is no objection by the defendant when there should be only a single Federal standard concerning the procedure involved in admitting confessions and statements in evidence. It is interesting to note that in the opinion (Appendix A, 2a) of the Superior Court of New Jersey, Appellate Division, the Court stated in affirming the conviction stated, "We see no plain error". It is respectfully urged that the doctrine of plain error is not applicable to a discussion of waiver of a constitutional right. The sole inquiry ought to be that, if there is error, has the State satisfied the Court beyond a reasonable doubt that the error complained of did not contribute to the conviction. *Chapman* v. *State of Californa*, 87 S. Ct. 824 (1967):

> "Production of evidence necessary to satisfy the burden imposed by this broad concept of voluntariness of confession rests with the State and evaluation of that evidence in the first instance is the clear duty of the trial court. He is not at liberty to shift that

responsibility to the shoulders of the jury. Moreover, appellate review of the issue must be searching and critical as well. If upon such analysis at either level the State has not shown that the statement constituting the confession was the product of an essentially free and unconstrained choice, it must be rejected."

See *Culombe* v. *Connecticut*, 367 U. S. 568 (1961).

It cannot be successfully contended that the alleged admission in the instant case did not contribute to the conviction.

It is, therefore, respectfully urged that the defendant's rights pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States have been violated, and as a consequence thereof a Writ of Certiorari should be granted.

III

In his summation to the jury, the Prosecutor, in referring to the premises in which the narcotics were found, stated (Appendix G, 17a):

"... I heard no testimony from the detectives and I put the question to them: 'Did you ascertain who lived there?'

'Yes'.

'Who?'

'Mrs. Lynn.'

"*Mrs. Lynn didn't tell the detectives that she hadn't been living in that front bedroom since she left for Kentucky.* I heard no such testimony from the detectives. I heard no such testimony from the detective or even from the defense witnesses, and I asked Mrs. Black:

> 'Did you hear Mrs. Lynn in the kitchen talk or tell the police that she did not live in the bedroom?'
>
> "And she said,
>
> 'No, I didn't hear her tell that to the police, and I didn't hear the police ask her either,' she said." (Emphasis added.)

The aforementioned comment by the State was immediately objected to by defense counsel as an improper remark by the Prosecutor in that the defendant is under no obligation to make any statements to the police or to say anything to the police, and that the comment by the Prosecutor violated this right of the defendant (Appendix G, 17a, 18a). This objection by defense counsel was met and aggravated by the following statement of the Prosecutor in the presence of the jury:

> "Your Honor, this is a comment. She is in the room talking. I am asking the jury if it is significant when the police asked of her, 'Who lives here?', she did not say 'Not me; somebody else.'" (Appendix G, 18a)

The Court in overruling the objection of the defendant and, in effect, approving both the comment in summation and the statement of the Prosecutor following the objection stated (Appendix G, 18a):

> "I will permit it."

It is clear that the defendant is under no obligation to take the witness stand in defense and that no inference may be drawn from the exercise of this constitutional right. The effect of *Griffin* v. *State of California*, 380 U. S. 609 (1965), rehearing denied 381 U. S. 957 (1965) is that a defendant shall suffer no penalty or be subject to any ad-

verse comment or inference by the exercise of his right to remain silent. It is evident from the comment of the Prosecutor in summation that he was asking the jury to draw an inference adverse to the defendant by virtue of the defendant's silence in the face of questions by members of the police department to the crucial question of control of the area in which the heroin was allegedly found. The comment was additionally harmful due to the added statement by the Prosecutor in response to defense counsel's objection. Is it not clear that by virtue of the Court's ruling that the comments by the Prosecutor both in summation and in response to the objection were given the added dignity of the Court's approval? It should be noted that in the charge the Court at no time corrected this harmful and erroneous ruling. The opinion of the Superior Court of New Jersey, Appellate Division (Appendix A, 2a) stated the following:

> "The comments of the Prosecutor in summation with reference to what defendant did and did not say to the police during the course of search, in our opinion, have not been shown to be improper."

The prejudicial effect of the Prosecutor's adverse comment on the defendant's silence is enhanced by the fact that it is cloaked in the context of a tacit admission. This alleged tacit admission by silence occurs at a time when a search warrant naming the defendant was used to enter the premises and a search of the same was consummated and the narcotics seized by the police. The State was asking the jury to believe that because the defendant was silent, when faced by the detectives, that she did, in fact, live in the front bedroom of the premises where the narcotics were found and seized. The propriety of this inference, as previously indicated, was supported by the colloguy leading to the Judge's comment, "I will permit it". (Appendix G, 18a).

It is settled that the doctrine of tacit or assenting silence is not only equivocal as a matter of common sense, but prejudicial and reversible as a matter of constitutional law. *Cf. Griffin* v. *State of California, supra.*

The above described impropriety was aggravated and the affect on the jury was even more pronounced when the Court in its charge stated the following, in describing the defendant's defense (Appendix G, 19a).

> "The defendant says: 'Oh, no. I wasn't in possession of it. I couldn't have been in possession of it because I didn't know it was in the bag.' And the defendant says further and produces evidence that this heroin was placed in this bag by Pete and, therefore, she had no intention to possess, to control, to exercise any dominion over it."

The Court use of the first person, it is respectfully urged, directed undue attention to the defendant's failure to take the stand. A reading of the transcript discloses that the defendant said nothing anywhere throughout the trial by virtue of her election to remain silent during the trial. Any reference to the defendant's failure to take the stand is a violation of the Fifth and Fourteenth Amendments. *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); *Griffin* v. *State of California, supra.* The trial Court further stated:

> "Now if you believe that story, you should acquit this defendant because she did not have possession of this heroin. But do you believe her? Do you believe her story? This case resolves itself into a question of fact and it seems to me, if you believe the State's story, you ought to convict this woman." (Appendix G, 19a)

It is obvious that in charging the foregoing, the court shifted the burden of proof to the defendant. The court imposed upon the jury the obligation of believing the defendant's story before rendering a verdict of acquittal. The court first says that if the defendant is believed, she should be acquitted, but goes on to imply that if she is not believed, and rhetorically so inquires of the jury, she should be convicted. It is noteworthy that in this portion of the charge, the court refers to "her" rather than "witnesses for the defense". The defendant's credibility was put in issue without her ever having testified. It is submitted that the charge of the trial court, together with the comments of the prosecutor, and their approval by the trial court, directed improper attention to the defendant's silence while in police custody and in the court room. Nowhere did the trial court charge that no adverse inference could be drawn against the defendant by virtue of her silence. Since control of the premises where the narcotics were found was such a crucial issue, and since the defendant elected not to take the stand, the prosecution is unable to demonstrate, as they are required to do under the rule in *Chapman, supra*, that these combined errors did not contribute materially to the conviction of this defendant. See also *Wheaton* v. *California*, —— U. S. ——, (decided March 14, 1967).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

HARRY STEINER,
Counsel for Petitioner,
Emma D. Lynn.

DAVID J. SCHAPIRA,
Attorney for Petitioner,
Emma D. Lynn.

APPENDIX A

Per Curiam Opinion of Superior Court, New Jersey, Appellate Division

(Filed—December 30, 1966)

Argued December 5, 1966—Decided Dec. 30, 1966.

Before Judges Sullivan, Kolovsky and Carton.

On appeal from the Essex County Court, Law Division.

Mr. David J. Schapira argued the cause for defendant-appellant (*Messrs. Schapira, Steiner & Walder*, attorneys).

Mr. George A. Franconero, Assistant County Prosecutor, argued the cause for plaintiff-respondent (*Mr. Brendan T. Byrne*, Essex County Prosecutor, attorney).

PER CURIAM

Defendant was convicted of the unlawful possession of a narcotic drug and was fined $1,000 and sentenced to not less than eight nor more than ten years in the Clinton Reformatory for Women. Her appeal sets forth seven grounds on which the conviction should be reversed. It is also contended that the sentence imposed is manifestly excessive.

We have considered all of the points raised by appellant and find them to be lacking in merit. A brief statement of our reasons is as follows:

The proofs on which the search warrant issued consisted not only of the affidavit, the adequacy of which defendant

has challenged, but also of the officer's sworn testimony of surveillance of the premises on some eight days which confirmed the information received from the reliable informant.

The officer's testimony that defendant had told him, in the course of his search and before he opened the pocketbook in which the narcotic was found, that the pocketbook belonged to her was not objected to at trial. Moreover, there is not the slightest indication that the answer was not freely and voluntarily given. We see no plain error.

We find no deficiency in the court's charge on the elements of possession. Nor do we agree that the charge directed "undue attention" to defendant's failure to take the stand.

The comments of the prosecutor in his summation with reference to what defendant did and did not say to the police during the course of the search, in our opinion, have not been shown to be improper.

Although the trial court did at one point exclude the testimony of defendant's daughter as to the source of the $2,000 found in the room, she was permitted to testify that she had obtained the money from her Aunt Beattie. Thereafter, defendant's son testified that the $2,000 was "money that my aunt inherited from my grandmother."

The sentence imposed on defendant was within statutory limits and was not manifestly excessive in the light of defendant's long record of prior convictions.

Finally, the State's proofs were ample to support the verdict of "guilty."

Affirmed.

APPENDIX A

Mandate on Affirmance of the Superior Court of New Jersey, Appellate Division

(Filed—December 30, 1966)

This cause having been duly argued before this Court by David J. Schapira, counsel for the appellant and George A. Franconero, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Essex County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Essex County Court to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 30th day of December, 1966.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

APPENDIX B

Order of the Supreme Court of New Jersey, Denying Petition for Certification

(Filed—March 14, 1967)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied and the appeal is dismissed with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 14th day of March, 1967.

A True Copy

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX C

Indictment No. 150-64

(Filed—October 1, 1964)

ESSEX COUNTY, TO WIT:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Emma D. Lynn on the 20th day of May, 1964 at the City of Newark, in the County of Essex aforesaid and within the jurisdiction of this Court, did unlawfully have in her possession a narcotic drug, to wit: heroin contrary to the provisions of R.S. 24:18-4, and against the peace of this State, the government and dignity of the same.

BRENDAN T. BYRNE
County Prosecutor

APPENDIX D

Affidavit of Lt. F. Thomas Mueller

STATE OF NEW JERSEY }
COUNTY OF ESSEX, } SS.:

F. THOMAS MUELLER, Acting Lieutenant of the Narcotics Division, in the Office of the Sheriff, County of Essex, State of New Jersey, being duly sworn according to law, upon his oath deposes and says that I have just and reasonable cause to believe and do believe that the following goods to wit: narcotic drugs and paraphernalia used in connection with the sale and use of narcotic drugs, are concealed on the person of Emma D. Lynn, and in the premises known and designated as No. 86 West Kinney Street, in the City of Newark, County of Essex and State of New Jersey; and that just and reasonable cause exists to believe that the said property is being used in connection with a violation of law, commonly known as Sale and Possession of Narcotic Drugs, contrary to the Statute in such case made and provided. NJS 24:18-4.

And deponent further states that the statements above recited, are based upon the following facts:

1. On May 4, 1964, Lt. T. Mueller of the Essex County Sheriff's Office received information from a reliable informant, who on former occasions has given him information that resulted in arrests and convictions of other narcotic peddlers. His information has proven to be reliable and pertinent to the fact that narcotics were being sold. His information is therefore reliable that Emma D. Lynn is involved in such narcotic sales.

Appendix D

2. On May 5, 1964, investigation was conducted under the supervision of Lt. Mueller of this office and it revealed that Emma D. Lynn is living at 86 West Kinney Street, Newark, N. J.

3. The said Emma D. Lynn has a previous record, Essex County Bureau of Identification A-77449. See attached record.

4. Lt. Mueller of the Sheriff's Office surveilled the premises of 86 West Kinney Street, Newark, N. J., May 5, 6, 7, 8, 12, 13, 15, 16, and observed known addicts frequenting the neighborhood; said addicts were observed entering and leaving the house of Emma D. Lynn, during both the daytime and nighttime.

The aforesaid information and investigation is the basis for deponent's belief that Emma D. Lynn is engaged in narcotics activity, and the premises known and designated as No. 86 West Kinney Street, in the City of Newark, County of Essex, State of New Jersey, is being used for the purpose of the sale and use of narcotic drugs, contrary to the statute in such case made and provided.

I therefore pray that a warrant be issued and said person be searched and said premises be entered and searched.

F. THOMAS MUELLER

(Sworn to May 19, 1964.)

APPENDIX E

Testimony of Lt. F. Thomas Mueller

ESSEX COUNTY COURT
LAW DIVISION—CRIMINAL
May 19, 1964, 4:10 P.M.
Newark, New Jersey

Before:

HONORABLE JACOB S. GLICKENHAUS,
J.C.C.

F. THOMAS MUELLER, sworn.

By the Court:

Q. What is your full name? A. F. Thomas Mueller.

Q. Are you engaged in law enforcement? A. Yes, sir.

Q. In what capacity? A. Head of the Narcotics Squad of the Essex County Sheriff's Office.

Q. You state in a paper which you have submitted to me, which is in the form an affidavit, that on May 4, 1964, you received information from a reliable informant with respect to activities of one Emma D. Lynn. Is that correct? A. Yes, sir.

Q. What was the information that you were given by this informant with respect to activities of Emma D. Lynn? A. That she was selling narcotics.

Q. And had this reliable informer proved—strike that. Had this informant on former occasions given you information that resulted in arrests and convictions of peddlers of narcotics? A. Yes, sir.

Q. And you state that his information was that Emma D. Lynn is engaged in the sale of narcotics. Is that what you state? A. Yes, sir.

Appendix E

Q. Now, on May 5 did you conduct an investigation? A. Yes, sir.

Q. Were you personally present at that time? A. Yes, sir.

Q. And what did it disclose? A. Disclosed that she is living at 86 West Kinney Street, in Newark.

Q. Newark, what? A. New Jersey.

Q. And what type of house is this? A. It's a regular dwelling house, one-family dwelling house.

Q. One-family dwelling house? A. Yes, sir.

Q. Did you investigation indicate that she was the sole occupant of this one-family dwelling house? A. There are several people in this. She has a daughter living there right now, and there is another man. We seen him going in many times. We don't know who he is.

Q. What does your investigation reveal so far as her being in charge or owning this house? A. Well, that the house was—she receives mail there; that the house is in her name, and has lived there for many years prior to this date.

Q. And did you conduct a surveillance of the premises? A. I did, sir.

Q. What premises? A. 86 West Kinney Street.

Q. Where? A. Newark, New Jersey.

Q. And on what dates did you conduct the surveillance? A. May 5, 6, 7, 8, 12, 13, 15, 16, and I observed known addicts frequent that neighborhood and enter and leave the premises.

Q. Do you know some of these known addicts by name? A. Yes, sir. I have seen some of them around, and I know some of them by name.

Q. And you state that these addicts were observed doing what? A. Going into the house, stay for a short period of time and leave.

Q. At what times of the day or night did you see these addicts enter the premises? A. It varied. Sometimes it was at 9, 10 o'clock. Sometimes 2, 3 o'clock in the morning.

Q. When you say "9, 10"— A. Sometimes during the day.

Q. —what do you mean? A. 9 a.m., 9:30, 10 p.m., 2, 3 a.m.

Q. Were some of these addicts known to you as being addicts? A. Yes, sir.

Q. When you say that they were known to be addicts, were they people with whom you had come in contact and knew of your own personal knowledge that they were addicts? A. Yes, sir.

Q. And did you acquire that knowledge on occasions from the fact that they were convicted of either possession of narcotics or sale of narcotics, or what? A. And use of narcotics.

Q. In other words, you knew them as having been convicted for the use of narcotics? A. Yes, sir.

Q. And those are the people that you referred to as known addicts? Is that correct? A. Yes, sir.

Q. Going back to this informant who you term as reliable. On how many occasions would you say that the information that was given to you by this informant resulted in arrests and convictions of narcotic peddlers? A. About six or seven times.

Q. And from your past experience with this informant or by reason of information acquired from this informant; do you have good reason to believe the statement of the informant? A. Definitely.

Q. By statement I mean statement of the informant with reference to the activities or Emma D. Lynn? A. Yes, sir.

Q. And you are seeking a search warrant for the prem-

ises at 86 West Kinney Street, Newark, New Jersey? A. Yes, sir.

Q. And you are seeking a search warrant for the premises occupied by Emma D. Lynn, over which she has possession and control? A. Yes, sir.

Q. And by that you mean the house at 86 West Kinney Street, Newark, New Jersey? A. Yes, sir.

Q. Mr. Mueller, you want this deposition to be accepted by the Court together with an affidavit which you are submitting to the Court at this time as a basis for the granting of the search warrant by this Court. Is that correct? A. Yes, sir.

I certify the within

LEONARD P. KATZ, C.S.R.
Official Court Reporter

Dated: May 19, 1964

Time: 4:30 P.M.

APPENDIX F

Warrant

STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.:

WHEREAS, it appears to me, HONORABLE JACOB S. GLICKENHAUS, Judge of Essex County Court, State of New Jersey, from the facts or circumstances presented to me, by the oath or affirmation of F. Thomas Mueller, Acting Lieutenant of the Narcotics Division, in the Office of the Sheriff, County of Essex, New Jersey, that probable cause exists to believe that the following goods to wit: narcotic drugs and paraphernalia used in connection with the sale and use of narcotic drugs, are concealed on the person of EMMA D. LYNN, and in the premises known and designated as No. 86 West Kinney Street, in the City of Newark, County of Essex, State of New Jersey; and that said facts or circumstances indicate probable cause exists to believe that the said property is being used in connection with a violation of law, commonly known as Sale and Possession of Narcotic Drugs, contrary to the Statute in such case made and provided. NJS 24:18-4.

These are, therefore, on motion of the County Sheriff, in the name of the State of New Jersey, to authorize and command any law enforcement officer with necessary and proper assistance to search the person of Emma D. Lynn, and to enter into the said premises known and designated as No. 86 West Kinney Street, in the City of Newark, County of Essex, State of New Jersey, during the daytime and/or nighttime, and there diligently search the said premises and any persons found therein for the said prop-

erty; and if you shall there find the same or any part thereof, that then you seize the said property so found and bring it together with the body of any person or persons so involved before me, Judge of the Essex County Court, New Jersey, to be dealt with according to law.

YOU ARE COMMANDED to execute this warrant within ten days from the issuance hereof, and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

GIVEN AND ISSUED under my hand at 4:30 o'clock P.M., this 19th day of May, A.D. 1964.

JACOB S. GLICKENHAUS
J.C.C.

APPENDIX G

Excerpts from Testimony

* * *

(commencing at 10-12)

F. THOMAS MUELLER, sworn.

Direct examination by Mr. Ronco:

* * *

(18)* Q. Was anything further found? A. A short time later, maybe a minute later, short time later Detective Suckey reached alongside of the night table—

Q. Did you see him do this? A. Well, I saw him come up and he had three pocketbooks in his hand.

Q. Was this near the night table you just made reference to where this money came from? A. Yes, yes.

Q. What did you see him reach for? A. Well, he reached in the back. When he come up he had—or alongside of it—he had three pocketbooks in his hand.

Q. Pocketbooks? A. Yes, sir.

Q. What kind of pocektbooks? A. There was two black ones and I think there was a bluish one. There was two black ones and another one. It was a little bit of a different color and the black. I think it was bluish.

Q. Were they ladies' pocketbooks? A. They were.

Q. What if anything was said to Mrs. Lynn regarding these three pocketbooks or asked of her? A. Suckey says,

---

* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Appendix G

"Are these yours?" She held all three of them up. I'm watching, and she says, "Yes, they're mine." He says, "Is there any money in them?" She says—I don't know whether she said, "I don't think so," or "I don't know," . . .

. . .

(commencing at 43-4)

WILLIAM L. SUCKEY, JR., sworn.

. . .

(commencing at 69-24)

Redirect examination by Mr. Ronco:

Q. Did you make inquiry as to who owned the other (70) pocketbooks in that room? A. I did.

Q. Who? A. I asked Mrs. Lynn. She said they were hers.

Q. Did you ascertain who that front bedroom was occupied by? A. No, I didn't.

Q. When you and Detective Mueller were with the defendant, Mrs. Lynn, for approximately 20, 25 minutes, who if anyone else entered the bedroom? A. Detective Hertig walked in, saw we were searching and he walked out. I believe Detective Taylor stood in the doorway and observed what we were doing.

Q. The question is: Who walked in besides you, Detective Mueller and the defendant, Mrs. Lynn? Who walked into that front bedroom? A. Detective Hertig.

Q. Did he remain? A. No.

Q. How about Detective Scott? A. Scott, yes.

Q. Did he remain after he walked in? A. That's correct.

Mr. Ronco: All right. No further questions.

Appendix G

By the Court:

Q. What do you mean "That is correct"? Did he or did he not remain after he walked in, or did he turn around and walk out? A. No. He walked in. Initially he followed me as I followed Mueller and Mrs. Lynn.

• • •

(commencing at 154-19)

ELIZABETH BLACK, sworn.

• • •

Cross-examination by Mr. Ronco:

• • •

(commencing at 183-2)

Q. They didn't ask you? A. No.

Q. And you didn't tell them? A. No.

Q. Did Mrs. Lynn tell the police that you and Pete had lived in that front bedroom for the past year? A. I don't know.

Q. You were sitting there. Did you hear? A. No, I didn't.

Mr. Ronco: I have no further questions, your Honor.

The Court: Anything further, Mr. Bozza?

Mr. Bozza: Just one point.

Redirect examination by Mr. Bozza:

Q. Mrs. Black, at the time that the police were there where did they question Mrs. Lynn? Did they question her in your presence or outside of the kitchen, or where? A.

Appendix G

They were in the hallway and I was in the kitchen.

Q. And you were in the kitchen? A. Yes.

Q. You were excited, were you? A. Yes, sir, sure I was.

Q. Did they ask you any questions at all about narcotics or anything? A. No.

Q. Do I take it that it was when you left the house with Pete that you asked him what was in that package and it was then that you learned it was narcotics? A. Yes.

* * *

(commencing at 229-7)

Mr. Ronco: * * *

Where were his clothes? Significant, isn't it? I heard no testimony from the detectives—and I put the question to them: "Did you ascertain who lived there?"

"Yes."

"Who?"

"Mrs. Lynn."

Mrs. Lynn didn't tell the detectives that she hadn't been living in that front bedroom since she left for Kentucky. I heard no such testimony from the detectives. I heard no such testimony from the detectives or even from the defense witnesses, and I asked Mrs. Black: "Did you hear Mrs. Lynn in the kitchen talk or tell the police that she did not live in the bedroom?" And she said, "No, I didn't hear her tell that to the police, and I didn't hear the police ask her either," she said.

Mr. Bozza: Now, if your Honor please, that is an improper remark by the prosecutor. The defendant is not under any obligation to make any statements to any (230) police under the United States Supreme Court decision, and he knows it. There is no

obligation on the defendant to say anything to the police, and it is unfair comment to say that to the jury.

Mr. Ronco: Your Honor, this is a comment. She is in the room talking. I am asking the jury if it is significant when the police asked of her, "Who lives here?" she did not say, "Not me; somebody else."

The Court: I will permit it.

Mr. Ronco: But wasn't that your recollection of what the detective testified to?

Talking about the credibility of Mrs. Black and how frank a witness she was, how believable she was, why didn't Mrs. Black in the kitchen say, after she knew that Mrs. Lynn was being locked up for possession of the narcotic drug that she saw it on the dresser table and saw Pete place it in the pocketbook? Why didn't she say that? "No. Pete took that package and put it in the pocketbook. It wasn't the defendant, Mrs. Lynn." She wasn't that credible a witness then, was she? And she wasn't that frank a witness then, was she? Nor was she after she learned that it was narcotics in the package from Pete himself later that day nor at any time thereafter.

* * *

(232) (The Court charges the jury as follows.)

Lyons, J.:

Members of the jury:

* * *

Appendix G

(commencing at 237-3)

Now, this isn't a difficult case to decide, members of the jury. Stripped of all verbiage, stripped of all its trappings, what do we have? The State of New Jersey contends and has attempted to prove that this particular defendant on the day named in the indictment was in unlawful possession of this heroin. The defendant says: "Oh, no. I wasn't in possession of it. I couldn't have been in possession of it because I didn't know it was in the bag." And the defendant says further and produces evidence that this heroin was placed in this bag by Pete and, therefore, she had no intention to possess, to control, to exercise any dominion over it.

Now, if you believe that story you should acquit this defendant because she did not have possession of this heroin. But do you believe her? Do you believe her story? This case resolves itself into a question of fact and it seems to me, if you believe the State's story, you ought to convict this woman.

Now, which is the more believable, the story more consonant with the truth, the story more consonant with the fact? Is it to be found in the State's exposition or is to be found in the defendant's (238) contentions? Now, of course, as I have told you before, the burden of proving this defendant guilty is on the State of New Jersey. The State of New Jersey is under a duty of proving her guilty by the greater weight of the credible evidence.

Now, it is not necessary for the State to prove that this woman was in actual, physical possession of this room. I can come within the prohibition of the

law by being in possession of something by going to a public telephone booth and secreting heroin. I can violate the law if I attempt to hide it in a public toilet. The test is whether or not I knew it was there, whether or not I had the intention of possessing it, of controlling it, of exercising dominion over it, and if I have that then I possess it within the definition of the law.

Now, it is for you to say, members of the jury, under all the facts and circumstances in this case what credence, what belief, you will give to each and every witness who took this witness stand and testified during this trial. That is for you to resolve.

Now, the word "intent" as I have used it, or "intention, intent" or "intention," members of the jury is a condition of the mind. * * *

(239) The Court: * * *

* * *

(240) * * * Are there any exceptions to my charge?

Mr. Bozza: Just one or two slight objections, your Honor.

(The following takes places at side bar.)

Mr. Bozza: One is that you said to the jury, "If you believe that story of the defendant you should acquit."

The Court: Yes.

Mr. Bozza: There is no responsibility on the part of a defendant to have them believe. If it generates reasonable doubt, that is sufficient.

The Court: Of course, that charge has to be read in connection with the balance of my charge.

Mr. Bozza: The next one is that you said, "If you believe the State's story you should convict."

The Court: That's right.

Mr. Bozza: That is an improper statement.

The Court: No, it is not.

Mr. Bozza: I am just putting my objection in.

The Court: All right.

Mr. Bozza: Then you said—I think this is true—inadvertently you said, "the greater weight of the credible evidence," and that is not the burden.

• • •

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 10 1967
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 123

EMMA D. LYNN,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

BRENDAN T. BYRNE,
County Prosecutor of Essex County,
Attorney for Respondent,
Essex County Court House,
Newark, New Jersey, 07102.

THOMAS P. FORD, JR.,
First Assistant Prosecutor,
BARRY H. EVENCHICK,
Assistant Prosecutor,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-0611-12

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United States Constitution Cited

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Fourteenth Amendment 4

Counter-Statement of the Case

(Defense Counsel's Opening to the Jury)

During his opening address to the jury, counsel for the defendant stated:

> ". . . there is a very strong and vehement denial by the defendant in this case that she possessed any narcotic drug that is laid in the indictment or referred to by the prosecutor. We will deny vehemently that this room where it is alleged that a narcotic drug was found, was not at that time the bedroom of the defendant. As a matter of fact, the defense will prove to you that this room, like one or two other rooms in this house, was rented out, and it disclosed that a particular James Brewer, together with his fiance, occupied that room, anticipatory to renting the entire first floor of this house from Emma Lynn.
>
> We will prove to you that the Lynns just prior to that had been down in Louisville, Kentucky, in regard to some inheritance that her two children got, one, Sylvia and Bill, and that they had come back to Newark and they were going to take all of their belongings down to Louisville, and in the meantime this room on the first floor, together with other rooms but this particular one—was rented by James Brewer. And, as a matter of fact, this particular house at 86 West Kinney Street is not even owned by the defendant but through inheritance it is owned by her daughter Sylvia and her son Bill. But she was there that morning when members of the Sheriff's Department came pursuant to the mandate of a search warrant. There isn't any question about it. And they came and they had a right by virtue of the

provisions of the search warrant to make a search, and they did make a search, and they made a search of this bedroom that he is speaking of, that he calls a bedroom. But it was a separate and distinct rental to Brewer." (3a-4a)

(Defense Counsel's Summation)

In the course of his summation to the jury, defense counsel stated:

"By the way, members of the jury, there is no criticism here of the police in what they did. They all went there and performed their respective functions and duties, but I do seriously disagree with their version that because it was found in a pocketbook that belonged to Sylvia, that that factually gives them the basis to lodge a charge against Mrs. Lynn, and it turns out that you, as a matter of circumstance, can take into account why Mrs. Lynn? Was the investigation lacking in some respect? She wasn't even the owner of the house because it was stipulated with the prosecution, in lieu of submitting the deed and the will and the tax bills, that the ownership of 86 West Kinney Street, and I think the testimony was, as well as 71, as well as 82, lies in Sylvia Lynn and her brother William, left to them by their grandmother. The grandmother left the properties to her two grandchildren.

Now, you have got to stretch the elastic pretty far to embrace as a possessor of a narcotic and to be convinced beyond a reasonable doubt that Emma possessed this narcotic. You have got to cross a lot of bridges before you do that. And I don't think that that falls within the category of proving a case beyond a reasonable doubt as against this defend-

ant, Emma Lynn. I cannot, under our system of jurisprudence, tell you that I can answer the argument of Mr. Ronco when he speaks to you and addresses you after I have terminated my discourse to you because under our system of jurisprudence I cannot speak any more. This is the last opportunity that I have in the case, and I don't want you, members of the jury, to get the impression that I am any more intelligent than you are. All I ask you to do is to apply your own worldly experiences to this case. There are divergent circumstances here.

I told you that there was no duty upon the defendant to produce any evidence in this case.

You talk about reasonable doubt. Not only is there a lack of reasonable doubt in this case but I think that the defendant has proved her innocence—

The defendant came forward with evidence and showed all the probabilities that might have occurred here in this case. What else can defense counsel do in a case of this kind where he comes into court and subpoenas and brings into court everyone who had some particular, specific knowledge about this case with the extraordinary speculation and gamble when I took the responsibility of calling Hertig, a member of the Sheriff's raiding staff? The very fact that Mr. Hertig said that he saw those two individuals come out of that room, does that give weight and credence to the concept and the contention of the defects? I do not deny nor dispute that there was a narcotic in that room, but it was not the defendant's Emma Lynn's. It was the narcotic indulger, the deceased, Mr. Brewer. He is the one who brought that narcotic into that room. It was his. And I have pity for him. I don't like a pusher or a seller or anyone else, but an addict to me is like a man who has diabetes. He has got a disease.

Mr. Ronco: Your Honor, I think counsel is now going far afield with the evidence adduced in this case. He is injecting himself.

The Court: Yes. Again, don't do it, Mr. Bozza. You are not on trial. You are an advocate." (6a-8a)

ARGUMENT

POINT I

Neither the comments of the assistant prosecutor during summation nor those of the Court in its charge was violative of the defendant's constitutional right to remain silent and to be free from compulsory self-incrimination.

In support of the argument that defendant was denied her rights under the Fifth and Fourteenth Amendments of the United States Constitution, principal reliance is placed upon the decision of this Court in *Griffin* v. *State of California,* 380 U. S. 609 (1965), rehearing denied 381 U. S. 957 (1965). Clearly, that decision forbids comment by the prosecution or the court upon the failure of the accused to testify in his own behalf. While the State acknowledges the holding in *Griffin,* it submits that the defendant's efforts to place herself within the protective scope of that decision are misguided. *Griffin* surely was not intended to provide a haven for one who would seek to testify through counsel's opening or closing to the jury while at the same time remaining off the witness stand during the course of the trial. Such is precisely what defendant did in the present case.

As noted, *supra,* defense counsel told the jury in detail that the defendant would prove that she was not the occu-

pant of the room in which the narcotics were found and that she in fact had knowledge that it had been rented to a person named James Brewer. He also told the jury in summation that he did not dispute the fact that there were narcotics in the room but only disputed the fact that they belonged to the defendant. When counsel used the word "I" he spoke for the defendant as if it were the defendant herself who was speaking. Therefore, the obvious tactical effort of counsel to minimize the inferences that the jury might reasonably be expected to have drawn from the defendant's failure to support the thesis of her case as outlined in counsel's opening invited the prosecutor's comment. Under the circumstances, the comment cannot be regarded as prejudicial evidence. *State* v. *Lowery,* 49 N. J. 476, 486 (1967); *Mash* v. *People,* 220 Ill. 86, 77 N. E. 92, 94 (1906); *State* v. *Fioravanti,* 46 N. J. 109 (1965), *certiorari* denied 384 U. S. 919, 86 S. Ct. 1367, 16 L. ed. 2d 440 (1966).

The state further urges that the comments of the assistant prosecutor did not relate to the critical issue of whether or not the defendant possessed the narcotics. Realistically, the comment pertained to the question of the ownership of the house in which the narcotics were found and to the question of who occupied the specific room in the house in which the narcotics were found. The ownership of the house had already been decided by virtue of a stipulation between counsel (6a). It is seen that that question was really not at issue. The basic reason for the comment was to discredit or to challenge the credibility of a witness named Mrs. Black, who had earlier testified at trial that she observed someone other than the defendant place the narcotics in a pocketbook (4a). There really was no comment by the assistant prosecutor on the failure of the defendant to deny possession of narcotics.

When the court charged the jury, it observed that the defendant's principal defense was that she did not know what was in the pocketbook and therefore did not possess it. The court was referring to what the defense counsel had argued in his opening and summation. Thus, *e.g.*, the defense had opened to the jury by stating "there is a very strong and vehement denial by the defendant in this case that she possessed any narcotic drug . . ." (3a). The court was merely referring to what defense counsel had said and in no way was commenting on the failure of the defendant to take the stand.

The State submits, finally, that even if it be true that the comments here under consideration in someway violated *Griffin, supra,* an appellate court could nevertheless find beyond a reasonable doubt that the comment did not affect the verdict of the jury. There was abundant evidence to support the verdict of the jury and there was virtually but one isolated reference by the assistant prosecutor to what the defendant had not said. This case can be contrasted with the situation in *Chapman* v. *California,* —— U. S. ——, 17 L. ed. 2d 705 (1967), where there had been a "machine-gun repetition" of prejudicial comments on the failure of the defendant to testify. Should this Court determine that there was invalid comment this case might appropriately be remanded to the New Jersey Appellate Courts for consideration of whether there was harmless error. See, *United States* v. *Wade,* —— U. S. ——, 18 L. ed. 1149, 1166 2d (1967); *Gilbert* v. *California,* —— U. S. ——, 18 L. ed. 2d 1178, 1187 (1967).

CONCLUSION

For the reasons expressed herein, it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

BRENDAN T. BYRNE,
County Prosecutor of Essex County,
Attorney for Respondent.

THOMAS P. FORD, JR.,
First Assistant Prosecutor,
BARRY H. EVENCHICK,
Assistant Prosecutor,
Of Counsel and on the Brief.

[APPENDIX FOLLOWS]

APPENDIX

Excerpts from Transcript of Testimony

ESSEX COUNTY COURT

THE STATE OF NEW JERSEY

v.

EMMA D. LYNN,

Defendant.

INDICTMENT NO. 150-64

ILLEGAL POSSESSION NARCOTIC DRUG

March 17, 1966
Newark 2, New Jersey

Before:

HONORABLE JOSEPH G. LYONS,
J.C.C., and a jury.

Appearances:

BRENDAN T. BYRNE, Prosecutor,
By: LEONARD D. RONCO, Assistant Prosecutor,
For the State.

SAMUEL D. BOZZA, Esq.,
Attorney for the defendant.

ADELAIDE PYKON,
Official Court Reporter

• • •

Colloquy

(commencing at 2-20)

(Mr. Ronco makes an opening statement to the jury on behalf of the State as follows.)

* * *

(5)* You will hear testimony as to what was done with this suspected narcotic drug, namely, that it was brought to the Newark police chemist for further analysis, and the State will offer the chemist who made the analysis of that which was found in the pocketbook of the defendant. And he will testify after making that analysis it was a narcotic drug, more particularly heroin.

That is the case of the State against this defendant. Those who were present and who can testify as to what was found in that bedroom will be offered as witnesses, and the chemist who made the analyzation of that suspected narcotic drug will also testify.

Listen carefully as the witnesses testify; judge of their credibility, their believability; watch the demeanor of the witnesses as they so testify for ultimately you must determine whether the defendant, Emma D. Lynn, is guilty or not guilty of the illegal possession of this narcotic drug based on the testimony that you hear and judging of the believability of the witnesses. I am sure you will have no difficulty in arriving at a just verdict in this case after you hear the evidence, together with the charge of the law as the Court will so state it to you.

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Thank you for your indulgence.

(6) (Mr. Bozza makes an opening statement to the jury on behalf of the defendant as follows.)

Mr. Bozza: May it please your Honor, Mr. Ronco, Miss Zarra, and members of the jury:

The issue in this case, members of the jury, is going to be a very, very simple one. But before I go into that, many of you have sat in a criminal case and perhaps, at least, I think I would feel a little remiss in my duty to my client and perhaps even to the members of the jury if I didn't reiterate some of the fundamental principles of law that govern a criminal case and upon which we rely as part and parcel of our defense.

I may state in the beginning by saying to you that there is a very strong and vehement denial by the defendant in this case that she possessed any narcotic drug that is laid in the indictment or referred to by the prosecutor. We will deny vehemently that this room where it is alleged that a narcotic drug was found, was not at that time the bedroom of the defendant. As a matter of fact, the defense will prove to you that this room, like one or two other rooms in this house, was rented out, and it disclosed that a particular James Brewer, together with his fiancee, occupied that room, anticipatory to renting the entire first floor of this house from Emma Lynn.

(7) We will prove to you that the Lynns just prior to that had been down in Louisville, Kentucky, in regard to some inheritance that her two children got, one, Sylvia, and Bill, and that they had come back to Newark and they were going to take all of their belongings down to Louisville, and in the mean-

time this room on the first floor, together with other rooms—but this particular one—was rented by James Brewer. And, as a matter of fact, this particular house at 86 West Kinney Street is not even owned by the defendant but through inheritance it is owned by her daughter Sylvia and her son Bill. But she was there that morning when members of the Sheriff's Department came pursuant to the mandate of a search warrant. There isn't any question about it. And they came and they had a right by virtue of the provisions of the search warrant to make a search, and they did make a search, and they made a search of this bedroom that he is speaking of, that he calls a bedroom. But it was a separate and distinct rental to Brewer.

* * *

ELIZABETH BLACK, sworn.

The Court: Now, you must keep your voice up so the jury may hear your answers, please.

Direct examination by Mr. Bozza:

* * *

(commencing at 165-2)

Q. You say you don't know whether that was the specific bag but it was a bag that looked like that? A. Yes.

Q. Now, after that happened what if anything did you and he do? A. After he said the police were outside and he grabbed this bag and he put this package into it, I started up the steps.

Q. Did he follow you out or— A. No. I left him.

Q. You left him. You went out? A. Yes.

Q. Where did you go? A. I started upstairs.

Q. Were you stopped by anybody? A. Yes. He told me to come down with the rest.

Q. Did you see Brewer come out of the room? A. I couldn't say yes or no because I was excited and I really don't know.

Q. Where were you taken after you were stopped on the stairway? A. In the kitchen.

Q. Were there many people there? A. Yes, there were more people.

Q. How many would you say? A. I really don't know.

Q. How long did you remain there? A. Until they had taken Mrs. Lynn away.

* * *

Mr. Bozza: * * * (207) he was peering out the window and saw members of the Sheriff's Department of whom he was probably acquainted with, became alarmed and with haste, I assume, and it is logical to so infer, he grabbed one of the many pocketbooks that was stored in that room and he put the narcotics in the pocketbook and probably threw it near the bed or wherever it was found by the Sheriff's men? And Mrs. Black, while she didn't say so on the stand, knew there was something wrong, knowing him, seeing little packages, got out of the room and went upstairs or tried to go upstairs, when she was apprehended, and Brewer tried to come out of the room when he was apprehended by Mr. Hertig. Imagine not producing the member of the Sheriff's staff who apprehended the individual that came out of the room. That is what I say is the hand of Prov-

idence. Isn't it logical to infer that Brewer in his haste and in order to avoid the police, put those packages in this pocketbook?

By the way, members of the jury, there is no criticism here of the police in what they did. They all went there and performed their respective functions and duties, but I do seriously disagree with their version that because it was found in a pocketbook that belonged to Sylvia, that that factually gives them the basis to lodge a charge against Mrs. Lynn, (208) And it turns out that you, as a matter of circumstance, can take into account why Mrs. Lynn? Was the investigation lacking in some respect? She wasn't even the owner of the house because it was stipulated with the prosecution, in lieu of submitting the deed and the will and the tax bills, that the ownership of 86 West Kinney Street, and I think the testimony was, as well as 71, as well as 82, lies in Sylvia Lynn and her brother William, left to them by their grandmother. The grandmother left the properties to her two grandchildren.

Now, you have got to stretch the elastic pretty far to embrace as a possessor of a narcotic and to be convinced beyond a reasonable doubt that Emma possessed this narcotic. You have got to cross a lot of bridges before you do that. And I don't think that that falls within the category of proving a case beyond a reasonable doubt as against this defendant, Emma Lynn. I can not, under our system of jurisprudence, I cannot tell you that I can answer the argument of Mr. Ronco when he speaks to you and addresses you after I have terminated my discourse to you because under our system of jurisprudence I cannot speak any more. This is the last oppor-

tunity that I have in the case, and I don't want you, members of the jury, to get the impression that I am any more intelligent than you are. All I ask you to (209) do is to apply your own worldly experiences to this case. There are divergent circumstances here.

I told you that there was no duty upon the defendant to produce any evidence in this case.

You talk about reasonable doubt. Not only is there a lack of reasonable doubt in this case but I think that the defendant has proved her innocence—

Mr. Ronco: I object, your Honor. Counsel is becoming personal. He is giving the jury the benefit of his personal opinion.

The Court: Yes. The evidence he means.

Mr. Bozza: The evidence. Of course, the evidence.

The Court: Well, don't use "I".

Mr. Bozza: All right. Then I suggest to you that by the production of the evidence that she submitted in this case, in her defense, bespeaks of innocence, let alone the burden that is upon the State to establish the guilt of the defendant beyond a reasonable doubt, which burden they have never shifts for the defendant. The defendant came forward with evidence and showed all the probabilities that might have occurred here in this case. What else can defense counsel do in a case of this kind where he comes into court and subpoenas and brings into court everyone who had some particular, specific knowledge about this case with (210) the extraordinary speculation and gamble when I took the responsibility of calling Hertig, a member of the Sheriff's raiding staff? The very fact that Mr. Hertig said that he saw those two individuals come out of that room,

does that give weight and credence to the concept and the contention of the defects? I do not deny nor dispute that there was a narcotic in that room, but it was not the defendant's Emma Lynn's. It was the narcotic indulger, the deceased, Mr. Brewer. He is the one who brought that narcotic into that room. It was his. And I have pity for him. I don't like a pusher or a seller or anyone else, but an addict to me is like a man who has diabetes. He has got a disease.

Mr Ronco: Your Honor, I think counsel is now going far afield with the evidence adduced in this case. He is injecting himself.

The Court: Yes. Again, don't do it, Mr. Bozza. You are not on trial. You are an advocate.

Mr. Bozza: I suggest, then, that you should have pity for the man who indulges in narcotics because they are like people that have a disease like diabetes.

The Court: Well, again, Mr. Bozza, we are not interested in that at all. The only question before this jury is that which is laid in the indictment. Whether we like or have any sympathy for a user is * * *